Supreme Court, U.S.
FILED
FEB 12 1992
OFFICE OF THE CLERK

No. 91-367

In The

Supreme Court of the United States

October Term, 1991

CAROL ANKENBRANDT, AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,

Petitioner,

vs.

JON A. RICHARDS AND DEBRA KESLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

RICHARD DUCOTE, Esq.
of the Louisiana Bar
Counsel for Petitioner
FINE & ASSOCIATES
335-337 Decatur Street
New Orleans, Louisiana 70130
(504) 581-5152

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1) IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL COURT JURISDICTION?

2) IF SO, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING DIVERSITY JURISDICTION OVER A TORT ACTION FOR DAMAGES?

3) DID THE DISTRICT COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?

The Petitioner is Carol Ankenbrandt, who appears with her minor daughters, Stephanie Richards and Lorelei Richards. The Respondents are Jon A. Richards and Debra Kesler. There are no other parties to the case.

TABLE OF CONTENTS

	Page
REFERENCES TO DECISIONS BELOW	1
GROUNDS FOR JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
IS THERE A "DOMESTIC RELATIONS EXCEPTION" TO FEDERAL DIVERSITY JURISDICTION?	4
IF THERE IS A "DOMESTIC RELATIONS EXCEPTION" TO FEDERAL DIVERSITY JURISDICTION, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING JURISDICTION OVER A TORT ACTION FOR DAMAGES?	9
DID THE TRIAL COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?	14
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
CASES	
Acord v. Parsons, 551 Supp. 115 (W.D.Va.1982)	10
Balistreri v. Pacifica Police Department, 855 F.2d 1421 (9th Cir.1988)	13
Barber v. Barber, 62 U.S. (21 How.) 582 (1859)	5, 8
Bennett v. Bennett, 682 F.2d 1039 (D.C.1982)	11
Cole v. Cole, 633 F.2d 1083 (4th Cir.1980)	11
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	10
County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959)	10
Crouch v. Crouch, 566 F.2d 486 (5th Cir.1978)	10
Crumpton v. Gates, 947 F.2d 1418 (9th Cir.1991)	6
Deakins v. Monaghan, 484 U.S. 193 (1988)	10, 16
De Centeno v. Gulf Fleet Crews, 798 F.2d 138 (5th Cir.1986)	6
De La Rama v. De La Rama, 210 U.S. 303 (1906)	6, 8
Drewes v. Ilnicki, 863 F.2d 469 (6th Cir.1988)	11
Goins v. Goins, 777 F.2d 1059 (5th Cir.1985)	10
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)	15
Hooks v. Hooks, 771 F.2d 935 (6th Cir.1985)	11

TABLE OF AUTHORITIES – Continued

Page

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 14

In re Burrus, 136 U.S. 586 (1890) 6, 7, 8

Jagiella v. Jagiella, 647 F.2d 561 (5th Cir.1981) 10

Judice v. Vail, 430 U.S. 327 (1977) 14

Lloyd v. Loeffler, 694 F.2d 489 (7th Cir.1982) 11

Logan v. Zimmerman Brush Co., 445 U.S. 422 (1982) 12

Love v. Davis, 353 F.Supp. 587 (E.D.La.1972) 6

McIntyre v. McIntyre, 771 F.2d 1316 (9th Cir.1985) 11

Moore v. Sims, 442 U.S. 415 (1979) 15

Moran v. Beyer, 734 F.2d 1245 (7th Cir.1984) 12

Morgan v. Foretich, 846 F.2d 941 (4th Cir.1988) 16

Morgan v. Foretich, 546 A.2d 407 (D.C.1988); 521 A.2d 248 (D.C.1987); 528 A.2d 425 (D.C.1987) 16

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 10

New Orleans Public Service Inc. v. City Council, 491 U.S. 350 (1989) 16

Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) 14

Ohio ex rel. Popovici v. Agler, 280 U.S. 389 (1930) ...6, 8

Peterson v. Babbit, 708 F.2d 465 (9th Cir.1983) 7

Raftery v. Scott, 756 F.2d 335 (4th Cir.1985) 11

TABLE OF AUTHORITIES – Continued

Page

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 11

Rogers v. Janzen, 891 F.2d 95 (5th Cir.1989) 10

Scweiker v. Wilson, 450 U.S. 221 (1981) 12

Sea-Land Services v. Gaudet, 414 U.S. 573 (1974) 6

Simms v. Simms, 175 U.S. 162 (1899) 5, 6, 8

Solomon v. Solomon, 516 F.2d 1018 (3rd Cir.1975) 4

Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y.1986) 8

Sutter v. Pitts, 639 F.2d 842 (1st Cir.1981) 7

Thompson v. Thompson, 484 U.S. 174 (1988) 7

Thurman v. City of Torrington, 595 F.Supp. 1521 (D.Conn.1984) 13

United States v. Iron Shell, 633 F.2d 77 (8th Cir.1980), cert. den. 450 U.S. 1001 (1981) 15

United States v. Nick, 604 F.2d 1199 (9th Cir.1979) 15

Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.1982), cert. den. 459 U.S. 1014 (1982) 11

Watson v. Kansas City, 857 F.2d 690 (10th Cir.1988) 13

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) ..*passim*

STATUTES AND CONSTITUTIONAL PROVISIONS

18 U.S.C. § 1169 15

28 U.S.C. 1254 (1) 1

28 U.S.C. § 1332 ..... 2, 5, 9, 13, 17

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1738A 7

28 U.S.C. § 2101 (c) 1

U.S. CONST. Art. III § 1 1

U.S. CONST. Art. III § 2 1

H.Con.Res. 172 (1990) 15

42 U.S.C. § 5101 15

42 U.S.C. § 10407 15

42 U.S.C. § 13001 15

La.Rev.Stat.Ann. (West 1988) §§ 13:1601-1605 2

LAW REVIEW ARTICLES AND TREATISES

Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 Hastings L.J. 571 (March, 1984) 5

Baron, *The Evolution of Domestic Relations Cases in Our Federal Courts*, 1985 S. Ill. L.J. 353 5

Brown, *When Federalism and Separation of Powers Collide-Rethinking Younger Abstention*, 59 George Washington L.Rev. 114 (1990) 16

Comment, *Civil Contempt and Child Sexual Abuse Allegations*, 40 Emory L.Rev. 203 (1991) 15

Comment, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 Columbia L.Rev. 1824 (1983) 5

Comment, *A Proposal for Abolishing the Domestic Relations Exception*, 71 Marquette L.Rev. 141 (1987) 5

TABLE OF AUTHORITIES – Continued

Page

Hart & Wechsler, *The Federal System and The Federal Courts* (1988) 7

Houlbrooke, *Church Courts and the People During the English Reformation* (1979) 8

Keating, *Children in Incestuous Relationships: The Forgotten Victims*, 34 (1) Loyola L.Rev. 11 (1988) 15

Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 Boston Col. L.Rev. 661 (1983) 5

Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 Case Western L.Rev. 1023 (1990) 16

Rodes, *Ecclesiastical Administration in Medieval England* (1977) 8

Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 Notre Dame L.Rev. 1 (1984) 5

Wunderli, *Ecclesiastical Courts in Pre-Reformation London* (1975) 8

Wunderli, *London Church Courts and Society* (1981) 8

REFERENCES TO DECISIONS BELOW

TRIAL COURT:

Ankenbrandt v. Richards, No. 89-4244 (E.D.La. Dec. 10, 1990). Unpublished.

ON APPEAL:

Ankenbrandt v. Richards, No. 91-3037 (5th Cir. May 31, 1991). Unpublished.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. § 1254 (1), § 2101 (c). The opinion below was rendered by the Fifth Circuit Court of Appeals on May 31, 1991. A timely petition for writ of certiorari was filed on August 29, 1991, and this Court granted certiorari on January 10, 1992.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Sec. 1, United States Constitution:

The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, Sec. 2, United States Constitution:

The judicial Power shall extend to . . . Controversies between Citizens of different States . . .

28 U.S.C. § 1332:

DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different states;

. . .

STATEMENT OF THE CASE

Petitioner Carol Ankenbrandt, a citizen of the State of Missouri, filed this tort action against Respondents Jon A. Richards and Debra Kesler, Louisiana citizens, under diversity jurisdiction on September 26, 1989, in the United States District Court for the Eastern District of Louisiana (Cert.Pet.App.A-7 - A-12) on behalf of her two daughters, L.R. (born 9/18/82) and S.R. (born 12/13/84). The complaint sought only to recover monetary damages for alleged sexual and physical abuse of the children committed by the Respondents. Respondent Richards is the divorced father of the children and Respondent Kesler, an attorney, is his female companion. Prior to the commencement of this action, on August 9, 1989, the Jefferson Parish, Louisiana, Juvenile Court had entered a judgment under the state's child protection laws[1] which permanently terminated all parental rights of Respondent

[1] LA.REV.STAT.ANN. (West 1988) §§ 13:1601-1605

Richards because of the abuse, and permanently enjoined him from any contact with the children (Cert.Pet.App.A-18 - A-19). That decision was never appealed and is final under state law.

On December 10, 1990, upon the motion of the Respondents, District Court Judge George Arcenaux dismissed the suit based on the "domestic relations exception" to federal court jurisdiction and the "*Younger* doctrine" of federal abstention (Cert.Pet.App.A-3). Petitioner appealed to the Fifth Circuit Court of Appeals. On May 31, 1991, the Fifth Circuit affirmed the judgment in a *per curiam* opinion (Cert.Pet.App.A-2). Certiorari was granted by this Court on January 10, 1992.

SUMMARY OF ARGUMENT

The rulings of the District Court and the Court of Appeals are erroneous and must be reversed for the following reasons:

1) Any "domestic relations exception" to federal diversity jurisdiction is very narrow in scope and is limited only to non-pecuniary cases such as the granting of judgments of separation, divorce, awards of child custody, and visitation orders.

2) No tort action cognizable under the applicable state law where the sum claimed exceeds $50,000 falls within the "domestic relations exception," regardless of the biological relationship of the parties.

3) Any denial of federal redress for tort victims based on the biological identity of the tortfeasor would be violative of the equal protection safeguards of the Fifth Amendment.

4) The *Younger* abstention doctrine is inapplicable to this case because there are no pending state court actions and no compelling, countervailing state interest.

5) Invocation of the *Younger* doctrine in this diversity suit is in violation of the separation of powers between Congress and the courts, since Congress has not exempted this type of case from the jurisdiction of federal courts.

ARGUMENT

IS THERE A "DOMESTIC RELATIONS EXCEPTION" TO FEDERAL DIVERSITY JURISDICTION?

Despite more than a century of jurisprudential analysis and scores of cases citing its existence, including several Supreme Court decisions, there still remains a legitimate question whether there is as such a "domestic relations exception" to federal diversity jurisdiction.[2]

[2] As Judge Gibbons stated in his dissent in *Solomon v. Solomon*, 516 F.2d 1018 (3rd Cir.1975), "[T]here is no well-established domestic relations exception. . . . Rather, there is a collection of misstatements of ancient holdings and ill-considered dicta." 516 F.2d at 1030.

Even more fertile for debate is the articulation of the nature and scope of the exception.[3]

The origin of the exception described by courts over the years is neither constitutional nor statutory. First, 28 U.S.C. § 1332 and its predecessors make no mention of a "domestic relations exception." This Court first decreed that federal jurisdiction does not extend to divorce and alimony cases in *dictum* in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). In that case the Court held that the United States District Court in Wisconsin had jurisdiction in a diversity action to enforce a New York State Court decree awarding the plaintiff a legal separation and alimony. While allowing the enforcement of an already-entered decree, the Court pointed out that the District Court was not asked to determine alimony anew. The seminal language followed: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board." 62 U.S. (How.21) at 584. In *Simms v. Simms*, 175 U.S. 162 (1899), that dicta was reiterated. It was not until the Court's

[3] See Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 Notre Dame L.Rev. 1 (1984); Baron, *The Evolution of Domestic Relations Cases in Our Federal Courts*, 1985 S. Ill. L.J. 353; Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 Hastings L.J. 571 (March, 1984); Comment, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 Columbia L.Rev. 1824 (1983); Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 Boston Col.L.Rev. 661 (1983); Comment, *A Proposal for Abolishing the Domestic Relations Exception*, 71 Marquette L.Rev. 141 (1987).

rulings in *De La Rama v. De La Rama*, 201 U.S. 303 (1906) and *Ohio ex rel. Popovici v. Agler*, 280 U.S. 389 (1930), that any explanation or authority for this disclaimer was urged. In *De La Rama*, the Court offered the tenuous rationale that a husband and wife cannot usually be citizens of different states and, the more logical argument, that divorce itself involves no pecuniary value. The major flaw in the first justification is that, while married couples are usually citizens of the same state while living together, the breakup precipitating the divorce action may well place a state border between them. Further, the ancillary implications of divorce are by all means pecuniary. In *Popovici* an altogether new reason was advanced, i.e., the term "civil proceedings" does not encompass what formerly would have belonged to the ecclesiastical courts, such as divorce actions. Child custody matters were added to the parameters of the exception in *In re Burrus*, 136 U.S. 586 (1890), again in broad, unsupported language[4]: "The whole subject of the domestic relations of husband and wife, parent and child,[5] belongs to the laws of the States and not to the laws of the United States." 136 U.S. at 593-594. However, it is important to

---

[4] This wording tracks language in *Simms, supra*, but Simms did not deal with a parent and a child.

[5] Federal courts routinely evaluate parent-child relationships in the context of loss of consortium claims in personal injury and wrongful death actions. Although the purpose of those inquiries is to place a dollar value on the lost relationship, the depth and quality of the relationship must be examined. See *Crumpton v. Gates*, 947 F.2d 1418 (9th Cir.1991); *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974); *Love v. Davis*, 353 F.Supp. 587 (E.D.La.1972); *De Centeno v. Gulf Fleet Crews*, 798 F.2d 138 (5th Cir.1986).

note that *Burrus* was actually confined to the issue of whether the federal courts could make a child custody award under the habeas corpus statutes absent diversity jurisdiction. The question of custody cases within the diversity criteria was expressly reserved.[6] Without further defining these "domestic relations of husband and wife, parent and child," the Court has left the federal courts below with an escape hatch through which to avoid adjudicating matters which for one reason or another sound too much like family business. See Hart & Wechsler, *The Federal Systems and the Federal Courts* 1460-1464 (1988). With consistency, predictability, and logic eluding the lower courts in their attempt to define and apply the exception, there is no consensus on whether the exception is actually a limitation on judicial power or an exercise of discretionary abstention.[7] Indeed, in *Thompson v. Thompson*, 484 U.S. 174 (1988), while refusing to recognize the existence of a federal cause of action to enforce the Parental Kidnapping Prevention Act[8], this

---

[6] "But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case, for the order for a violation of which the petitioner is imprisoned for contempt is not a judgment of the Circuit Court of the United States, but a judgment of the District Court of the same District." *Burrus*, 136 U.S. at 596.

[7] See Hart & Wechler, at 1468. See also, discussion of applicability of *Younger* doctrine to this case, *infra*. See also, *Sutter v. Pitts*, 639 F.2d 842 (1st Cir.1981); *Peterson v. Babbit*, 708 F.2d 465 (9th Cir.1983).

[8] 28 U.S.C. § 1738A.

Court only alluded to the exception and characterized it not as a Constitutional or statutory creature, but as "the longstanding *tradition* of reserving domestic relations matters to the States." 484 U.S. at 186, n. 4 [emphasis added].

In the final analysis, if the historical underpinnings of *Barber, Simms, De La Rama, Burrus, and Popovici* are invalid, there should be no "domestic relations exception" to diversity jurisdiction. In fact, in *Spindel v. Spindel*, 283 F.Supp. 797 (E.D.N.Y.1986), the learned Judge Weinstein effectively refuted the grounds previously asserted to justify the exception. As he so thoroughly points out, with abundant citation, there is simply no accuracy in the statement that ecclesiastical courts were the sole adjudicators of separation and divorce prior to the enactment of the Constitution.[9] Likewise, he documents many federal decisions involving aspects of marital or familial status and observes:

> Despite occasional extravagant disclaimers, it has long been recognized that the federal courts are competent to determine matters involving some aspects of marital status, either directly or indirectly. The fact that, incidental to the exercise of federal jurisdiction, there is an impact or effect on a matter which is cognizable in the state court cannot divest the federal court of its

[9] It should also be noted that ecclesiastical courts historically had jurisdiction over ordinary criminal and civil matters as well. See Wunderli, *London Church Courts and Society* (1981); Wunderli, *Ecclesiastical Courts in Pre-Reformation London* (1975); Houlbrooke, *Church Courts and the People During the English Reformation* (1979); Rodes, *Ecclesiastical Administration in Medieval England* (1977).

> power [extensive citations omitted]. 283 F.Supp. at 810.

In conclusion, there is no legitimate "domestic relations exception" to diversity jurisdiction. Yet, the federal courts need no such exception to avoid granting divorces, awarding child custody, and fixing parental visitation. These issues simply do not meet the diversity criteria since the matters in controversy do not cross the $50,000 threshold of 28 U.S.C. § 1332. A literal reading of the statute will shield the federal courts from their worst nightmare of attracting the throngs now milling about the local divorce courts. However, suits between citizens of different states involving claims of $50,000 or more, even if that sum represents alimony, child support, or property division, are still properly in federal court until Congress amends § 1332 to read otherwise. Under that interpretation the separation of powers concern, discussed *infra*, is not looming and reliance upon questionable abstention practices is not necessary.

IF THERE IS A DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING JURISDICTION OVER A TORT ACTION FOR DAMAGES?

While the tort claims aspect of any "domestic relations exception" has never been addressed specifically in this Court, it is clear that federal courts must exercise diversity jurisdiction over tort claims properly pled if the alleged tort is cognizable under the relevant state substantive law and the other criteria of § 1332 are satisfied. The decision at issue and the line of Fifth Circuit cases

supporting it are the most extreme of any circuit's and disregard this Court's observation in *Deakins v. Monaghan*, 484 U.S. 193 (1988):

> This Court has repeatedly stated that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction except in those extraordinary circumstances "where the order to the parties to repair to the State would clearly serve a countervailing interest." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 817, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976), quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 3 L.Ed.2d 1163, 79 S.Ct. 1060 (1959); see also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983). 484 U.S. at 203.

In *Deakins*, the Court in an analogous situation reversed the dismissal of a suit for damages, but agreed to stay the action until resolution of the underlying state criminal case. That approach has been used in tort actions involving family members where there is an ongoing state court action over the same facts and issues. See *Acord v. Parsons*, 551 F.Supp. 115 (W.D.Va.1982).

Despite the extreme position taken by the Fifth Circuit in the case at bar and its predecessors[10], other circuits

---

[10] *Jagiella v. Jagiella*, 647 F.2d 561 (5th Cir.1981); *Rogers v. Janzen*, 891 F.2d 95 (5th Cir.1989); *Goins v. Goins*, 777 F.2d 1059 (5th Cir.1985); and *Crouch v. Crouch*, 566 F.2d 486 (5th Cir.1978). It might be wondered where the Fifth Circuit would draw the line in closing the courthouse door on relatives. First cousins? Brothers-in-Law?

generally do not apply the exception to intrafamilial tort actions. In *Bennett v. Bennett*, 682 F.2d 1039 (D.C.1982), the court denied the application of the exception in a tort claim for custody interference, but applied the exception to injunctive relief. The exception has been held inapplicable in tort cases stemming from custody and visitation disputes in *Cole v. Cole*, 633 F.2d 1083 (4th Cir.1980); *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir.1982), *cert. den.* 459 U.S. 1014; *Raftery v. Scott*, 756 F.2d 335 (4th Cir.1985). Similar results were reached in *Drewes v. Ilnicki*, 863 F.2d 469 (6th Cir.1988); *Hooks v. Hooks*, 771 F.2d 935 (6th Cir.1985); and *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir.1982). In *McIntyre v. McIntyre*, 771 F.2d 1316 (9th Cir.1985), the court reversed the dismissal of a father's tort action against his former wife and her relatives for violation of his visitation rights. The court held that the exception was inapplicable where 1) questions of status were not involved, 2) there was no interference with pending state court domestic relations proceedings, 3) no alteration of state court judgment is involved, and 4) state court's supervision of a minor was not impinged.

Beyond the logical and statutory arguments that tort actions should not be excluded where the parties are family members, a denial of redress in federal court simply because the tortfeasor is a relative violates the equal protection guarantees of the Fifth Amendment.[11] In

---

[11] The Due Process clause of the Fifth Amendment imposes on the federal government the equal protection standards imposed on the States by the Fourteenth Amendment. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

Moran v. Beyer, 734 F.2d 1245 (7th Cir.1984), the court declared unconstitutional under an equal protection analysis an Illinois statute which prohibited one spouse from suing another since the law was not rationally related[12] to any tendered purpose, such as maintaining marital harmony. In that case, a wife sued her husband in federal district court under diversity jurisdiction to recover damages for years of physical abuse. Although the "domestic relations exception" was never raised nor addressed, the district court dismissed the suit under the state statute. In reversing that order, Judge Evans observed facts applicable to the instant case[13]:

> Had the paths of these two individuals crossed under any circumstances other than marriage, the district court [under diversity jurisdiction] would have proceeded to weigh their allegations and decide who, on the basis of the evidence, should win the case. 734 F.2d at 124.

Using the language of Justice Blackmun in his concurring opinion in *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 442 (1982), it takes "something more than the strained imagination" to even place physical beatings and

---

[12] The court applied the standard of *Scweiker v. Wilson*, 450 U.S. 221 (1981), i.e., whether the statute's purpose is reasonable and whether the statute rationally advances that purpose. That is the test in the case at bar.

[13] Although Respondent Kesler is in no way related to these children, she has also been included within the exception. Given the Fifth Circuit's harsh interpretation of the exception, she would probably have been successful in pleading the exception had she been alone as a defendant, despite the unreasonableness of that result.

the type of heinous sexual abuse of these small children pled in the instant case[14] within the definition of "domestic relations." Accordingly, it has been held to be a violation of equal protection safeguards for police departments to treat victims of domestic violence differently than other crime victims. *Watson v. Kansas City*, 857 F.2d 690 (10th Cir.1988); *Balistreri v. Pacifica Police Department*, 855 F.2d 1421 (9th Cir.1988); *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D.Conn.1984). There is absolutely no rational federal purpose in discriminating in the application of § 1332 against those plaintiffs victimized by their relatives, so to do so is unconstitutional. The absence of purpose is especially compelling when the damages sought are compensation for acts of violent abuse.

As discussed *supra*, courts have been unclear in their determinations as to whether refusal to hear this broad group of so-called "domestic relations cases" stems from a lack of jurisdiction or from an abstention from the exercise of authorized jurisdiction. Again, since § 1332 does not specifically provide for such an exception where diversity exists and the claim exceeds $50,000, federal courts have jurisdiction to adjudicate the case. Further analysis of this point requires discussion of Article III of the Constitution and the doctrine of separation of powers, addressed below.

---

[14] Sexual fondling, penetration with objects, chaining the children to boards, and pornographic photography (Cert.Pet.App. p.A-8).

DID THE TRIAL COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?

The doctrine of *Younger v. Harris* provides that the federal courts should not interfere with state court criminal proceedings under the principle of "comity." The Court defined comity as respect for States and their institutions which should be free to perform "their separate functions in their separate ways." 401 U.S. at 44. Moving beyond criminal proceedings, the doctrine has been applied to a variety of cases.[15]

First, assuming for the sake of this initial argument that *Younger* and its general application to civil matters is legitimate, the case before the Court does not meet the *Younger* abstention criteria and it was therefore error for the District Court to invoke it in dismissing the complaint. Fatal to the *Younger* approach is the absence of pending state court proceedings. The unappealed juvenile court judgment "finally and unalterably" terminating all of Respondent Richards' parental rights[16] ended the involvement of Louisiana and its court system. The prospect that Richards might someday reopen his state court custody cases, as "feared" by the District Court[17] should he win the federal suit, is also insufficient justification

---

[15] *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) [civil nuisance action]; *Judice v. Vail*, 430 U.S. 327 (1977) [contempt proceedings]; *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986) [administrative proceedings].

[16] See Cert.Pet.App. pp.A-18 - A-19.

[17] See District Court Order, Cert.Pet.App. p. A-5, n.4.

for *Younger* abstention. As this Court noted in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), *Younger*-type abstention does not apply when state judicial proceedings have not yet commenced[18].

Further, contrary to The District Court's assumption, child abuse, and particularly child sexual abuse, is not a concern solely within the province of state law. In fact, state law and state courts have come under attack for inappropriate responses to abuse cases, particularly when the abuser is the divorced parent of the child victim.[19] Concurrently, Congress has created a growing federal presence in the policy making and funding of strategies to combat the child abuse problem.[20] The lower federal courts have likewise proved themselves competent to analyze and judge child abuse problems. See *United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert. den.* 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d 1199

---

[18] Cf. *Moore v. Sims*, 442 U.S. 415 (1979), where *Younger* was held applicable to a federal suit enjoining *ongoing* Texas child abuse litigation.

[19] See Keating, *Children in Incestuous Relationships: The Forgotten Victims*, 34 (1) Loyola L.Rev. 111 (1988); Comment, *Civil Contempt and Child Sexual Abuse Allegations*, 40 Emory L.Rev. 203 (1991).

[20] See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq.; Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 et seq.; Indian Child Protection and Family Violence Protection Act, 18 U.S.C. § 1169; National Clearinghouse on Family Violence Prevention, 42 U.S.C. § 10407; H.Con.Res. 172 (1990) [Expression of Congressional intent that state courts should not award custody of children to perpetrators of domestic violence].

(9th Cir.1979); *Morgan v. Foretich*[21], 846 F.2d 941 (4th Cir.1988) [with Retired Justice Lewis Powell sitting on the panel].

Thus examined, a *Younger* abstention here violates the "unflagging obligation" of the District Court to exercise its grant of diversity jurisdiction over this tort action. *Deakins v. Monaghan*, supra.

A more basic question, however, is whether the *Younger* doctrine should now be seen in its essence as an unacceptable breach of the separation of powers allocated between the Congress, who defines the scope of federal jurisdiction under Article III of the Constitution, and the courts who exercise the grant of jurisdiction.[22] Given the Court's discussion in *New Orleans Public Service v. New Orleans City Council*, 491 U.S. 350 (1989), regarding the problems inherent in *Younger* abstention, the better reasoned approach is to abandon *Younger* as a fountain

---

[21] Although the "domestic relations exception" and *Younger* abstention were not raised at the trial or appellate level, this tort action was tried simultaneously with the state (District of Columbia) court child custody and visitation proceedings. Although the Fourth Circuit made its own finding that the sexual abuse of the child by the father had been proved, a contrary decision was consistently reached by the District of Columbia courts. *Morgan v. Foretich*, 546 A.2d 407 (D.C.1988); 521 A.2d 248 (D.C.1987); 528 A.2d 425 (D.C.1987). Even in this extreme situation, the federal and state systems performed their parallel functions without interference from the other.

[22] See Brown, *When Federalism and Separation of Powers Collide-Rethinking Younger Abstention*, 59 George Washington L.Rev. 114 (1990); Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing,"* 40 Case Western L.Rev. 1023 (1990).

of jurisdictional law, and instead return to Congress the responsibility for shaping the contours of federal authority. Since Congress has not exempted tort actions against fathers in § 1332, the District Court erred and the decisions below must be reversed.

CONCLUSION

For the reasons set forth above, the decisions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for trial.

Respectfully submitted,

RICHARD DUCOTE, Esq.
Counsel for Carol Ankenbrandt
FINE & ASSOCIATES
335-337 Decatur Street
New Orleans, LA 70130
(504) 581-5152